

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SEHYON KIM,

Plaintiff,

v.

CAPITAL ONE NATIONAL
ASSOCIATION,

Defendant.

No. 2:20-cv-2354 TLN DB PS

ORDER AND
FINDINGS AND RECOMMENDATIONS

Plaintiff Sehyon Kim is proceeding in this action pro se. This matter was, therefore, referred to the undersigned in accordance with Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1). On December 2, 2020, defendant noticed a motion to dismiss for hearing before the undersigned on January 8, 2021. (ECF No. 7.) Pursuant to Local Rule 230(c) plaintiff was to file an opposition or a statement of non-opposition to defendant's motion "not less than fourteen (14) days preceding the noticed . . . hearing date." Plaintiff, however, failed to file a timely opposition or statement of non-opposition.

Accordingly, on January 4, 2021, the court issued an order to show cause, ordering plaintiff to show cause in writing within fourteen days as to why this action should not be dismissed for lack of prosecution, as well as ordering plaintiff to file a statement of opposition or non-opposition to defendant's motion on or before January 29, 2021. (ECF No. 9.) Plaintiff was

1 warned that the failure to timely comply with that order could result in a recommendation that
2 this case be dismissed. (Id. at 2.) Nonetheless, the time provided plaintiff has expired and
3 plaintiff has not responded to the January 4, 2021 order.

4 ANALYSIS

5 The factors to be weighed in determining whether to dismiss a case for lack of prosecution
6 are as follows: (1) the public interest in expeditious resolution of litigation; (2) the court's need
7 to manage its docket; (3) the risk of prejudice to the defendant; (4) the public policy favoring
8 disposition on the merits; and (5) the availability of less drastic sanctions. Hernandez v. City of
9 El Monte, 138 F.3d 393, 398 (9th Cir. 1998); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir.
10 1992); Carey v. King, 856 F.2d 1439, 1440 (9th Cir. 1988). Dismissal is a harsh penalty that
11 should be imposed only in extreme circumstances. Hernandez, 138 F.3d at 398; Ferdik, 963 F.2d
12 at 1260.

13 Failure of a party to comply with the any order of the court "may be grounds for
14 imposition by the Court of any and all sanctions authorized by statute or Rule or within the
15 inherent power of the Court." Local Rule 110. Any individual representing himself or herself
16 without an attorney is nonetheless bound by the Federal Rules of Civil Procedure, the Local
17 Rules, and all applicable law. Local Rule 183(a). A party's failure to comply with applicable
18 rules and law may be grounds for dismissal or any other sanction appropriate under the Local
19 Rules. Id.

20 Here, plaintiff has failed to respond to the January 4, 2021 order, and has failed to file a
21 statement of opposition or non-opposition to defendant's motion to dismiss. Plaintiff was warned
22 that the failure to file a written response to that order could result in a recommendation that this
23 matter be dismissed. In this regard, plaintiff's lack of prosecution of this case renders the
24 imposition of monetary sanctions futile. Moreover, the public interest in expeditious resolution of
25 litigation, the court's need to manage its docket, and the risk of prejudice to the defendant all
26 support the imposition of the sanction of dismissal. Only the public policy favoring disposition
27 on the merits counsels against dismissal. However, plaintiff's failure to prosecute the action in
28 any way makes disposition on the merits an impossibility. The undersigned will therefore

1 recommend that this action be dismissed due to plaintiff's failure to prosecute as well as
2 plaintiff's failure to comply with the court's orders. See Fed. R. Civ. P. 41(b).

3 Accordingly, IT IS HEREBY ORDERED that:

4 1. Defendant's December 1, 2020 motion to dismiss (ECF No. 5) is denied without
5 prejudice as having been rendered moot¹; and
6 2. The February 12, 2021 hearing of defendant's motion is vacated.

7 Also, IT IS HEREBY RECOMMENDED that:

8 1. Plaintiff's complaint (ECF No. 1-2) be dismissed without prejudice; and
9 2. This action be closed.

10 These findings and recommendations are submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
12 after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
15 shall be served and filed within fourteen days after service of the objections. The parties are
16 advised that failure to file objections within the specified time may waive the right to appeal the
17 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 Dated: February 8, 2021



19
20 DEBORAH BARNES
21 UNITED STATES MAGISTRATE JUDGE
22

23 DLB:6
24 DB/orders/orders.pro se/kim2354.dlop.f&rs
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27 _____
28 ¹ In the event the assigned District Judge does not adopt these findings and recommendations,
defendant may re-notice their motion for hearing before the undersigned.